

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

**FUNCTION MEDIA, L.L.C.**

§

**Plaintiff,**

§

**Civil Action No. 2007-CV-279**

§

**vs.**

§

**GOOGLE, INC. AND YAHOO, INC.**

§

§

**Defendants.**

§

§

**JURY TRIAL DEMANDED**

§

**PLAINTIFF'S RESPONSE TO GOOGLE'S MOTION FOR  
SUMMARY JUDGMENT THAT ANY ALLEGED INFRINGEMENT OF  
U.S. PATENT NOS. 6,446,045, 7,240,025 AND 7,249,059 WAS NOT WILLFUL**

At the time Google filed its motion for summary judgment on willfulness, FM was asserting three patents: the '045, the '025, and the '059. On October 9, 2009, this Court issued its *Markman* order, wherein it held the asserted claims of the '045 to be indefinite.

Following the *Markman* order, two FM patents therefore remain in the case, the '025 and the '059. Although the '045 patent issued in 2002, the '025 and the '059 patents issued shortly before FM filed suit. Accordingly, any willfulness claim by FM as to these patents would necessarily focus on post-lawsuit activity by Google. As such, FM does not intend to pursue any post-lawsuit willfulness theories.

Therefore, reserving all appellate rights, FM agrees to forego any willfulness claim as to Google's infringement of the '025 and '059 patents. Because the Court has already dismissed the '045 from the case, Google's willfulness motion as to the '045 is moot.

This Court should therefore deny Google's motion for summary judgment on willfulness as moot.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2009, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

/s/ Joseph S. Grinstein  
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